Supreme Court, U.S.
FILED

(1)

No. 03-42 JUL 2 2003

In The
Supreme Court of the United States

JENNIFER LAND, Individually and on Behalf of All Other Similarly Situated Persons,

Petitioner,

v.

MBNA AMERICA BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Fifth District Of Texas At Dallas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Do the disclosure requirements of *Commonwealth Coatings, Corp. v. Continental Casualty, Co.*, 393 U.S. 145 (1968) apply to an arbitration service that aggressively solicits one party and maintains control of the selection of arbitrators and modification of procedural rules?

II. Is an arbitration provision unconscionable if it is jointly created by the arbitration service and one party of superior bargaining power and then submitted as binding without negotiation unless affirmatively rejected by the party of inferior bargaining power?

LIST OF PARTIES

1.	Petitioner:	Jennifer Land, Individually and on Behalf of All Other Similarly Situated Persons
2.	Respondent:	MBNA America Bank, N.A.
3.	Interested Parties:	Metro Collections n/k/a Viking Collection Services Southwest, Inc. Viking Collection Services, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Federal Statute Involved	2
Statement of the Case	2
Statement of Facts	3
Reasons for Granting Writ	6
Conclusion	15

TABLE OF AUTHORITIES

Page

CASES

FEDERAL CASES

Austern v. Chicago Bd. Options Exchange, Inc., 898 F.2d 882 (2nd Cir. 1990) 10

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 7, 8

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 11

EEOC v. Waffle House Corp., 534 U.S. 279 (2002) 6

Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991) 6, 11, 12

Hawkins v. National Ass'n of Securities Dealers, Inc., 149 F.3d 330 (5th Cir. 1998) 10

Honn v. National Ass'n of Securities Dealers, 182 F.3d 1014 (8th Cir. 1999) 10

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 6, 8

Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 8

New England Cleaning Servs., Inc. v. AAA, 199 F.3d 542 (1st Cir. 1999) 10

Olson v. National Ass'n of Secs. Dealers, 85 F.3d 381 (8th Cir. 1996) 10

Tamari v. Conrad, 552 F.2d 778 (7th Cir. 1977) 11

STATE CASES

In re Halliburton Co., 805 S.W.3d 566 (Tex. 2002) 12

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

9 U.S.C. § 2 ..... 2, 11, 15

28 U.S.C. § 1257 1

STATE STATUTES

Del. Code Ann. Tit. 5 § 952(a) 6

MISCELLANEOUS

Caroline E. Mayer, *You Can't Sue Us*, THE WASHINGTON POST, May 22, 1999, at A01 9

Barry Meier, *In Fine Print*, Customers Lose Ability to Sue, N.Y. TIMES, March 10, 1997, at A1 9

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the Opinion and Order of the Court of Appeals, Fifth District of Texas at Dallas, rendered on November 22, 2002.

OPINIONS BELOW

The Orders Related to Motion to Compel Arbitration of the Dallas County District Court, 116th Judicial District is reproduced in the appendix to this petition, p. App. 4. The Opinion of the Court of Appeals, Fifth District of Texas at Dallas is reproduced in the appendix to this petition, p. App. 1. The Order of the Court of Appeals, Fifth District of Texas at Dallas, denying Petitioner's Motion for Rehearing is reproduced in the appendix to this petition, p. App. 3. The Order of the Supreme Court of Texas is reproduced in the appendix to this petition, p. App. 6.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Texas denying Petitioner's request for writ of mandamus was rendered on April 3, 2003. This Petition was timely filed within ninety (90) days of said Order.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

FEDERAL STATUTE INVOLVED

9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

The underlying action concerns, in part, Defendant MBNA's unilateral attempt to prevent cardholder challenges to its actions in court and to prevent class actions by cardholders in any forum; relegating them to mandatory arbitration administered exclusively by the National Arbitration Forum (NAF), an entity that aggressively solicited MBNA's potential $2.7 billion worth of arbitration business. MBNA filed its Motion to Compel Arbitration and Plea in Abatement on September 21, 2001, seeking to enforce an arbitration clause in a document (the *"Change in Terms"*) purportedly mailed to cardholders by third parties on behalf of MBNA on December 20, 1999. Petitioner sought written and oral discovery in the trial court, but numerous objections were lodged by MBNA, NAF refused to disclose its confidential relationship with MBNA, and many discovery issues remained unresolved at the time of the Trial Court's Order. The Trial Court held a hearing on August 9, 2002 limited primarily to Land's

procedural and evidentiary arguments. However, contrary to the Trial Court's statements at that hearing that substantive argument would be heard at a later hearing after evidentiary rulings, on September 4, 2002 the Trial Court entered an Order, without that further hearing, granting MBNA's Motion and abating the underlying action. Petitioner sought relief from the Fifth Court of Appeals in an original proceeding which, after requesting briefing from MBNA, was denied on November 22, 2002. Motion for Rehearing was denied on December 9, 2002. An original proceeding was filed with the Texas Supreme Court arising from the Trial Court's Order denying a continuance, overruling Petitioner's evidentiary objections, and granting MBNA's Motion to Compel Arbitration and Plea in Abatement without jury trial or evidentiary hearing. The Texas Supreme Court denied Petitioner's request for Writ of Mandamus on April 3, 2003.

STATEMENT OF FACTS

Respondent MBNA, a national bank with over $86 billion in loans, is the largest independent credit card lender in the world.

In 1993, Petitioner Land entered into a credit card agreement with MBNA. MBNA claimed to have amended the agreement in 1998 to provide for the application of Delaware law. As early as November 6, 1998, and after the 1998 American Bankers Association Convention at which National Arbitration Forum (NAF) solicited many billions of dollars of potential business from credit card issuers, MBNA and NAF began drafting amendments to card agreements eliminating court jurisdiction in favor of

mandatory arbitration and precluding class actions in any forum. At least 11 MBNA internal and outside attorneys, as well as business people, worked with NAF representatives over a 13 month period researching, drafting, and revising the Change in Terms.

NAF, the exclusive arbitration administrator, had actively solicited MBNA's $2.7 billion portfolio representing that the amendment would limit consumer recoveries. NAF actively participated in drafting the proposed language and planning of implementation for the arbitration provision. Likewise, NAF provided MBNA documents (marked "CONFIDENTIAL") describing the Offensive and Defensive ways to use its arbitration against cardholders and additionally provided MBNA lists of potential arbitrators. To date MBNA has paid many hundreds of thousands of dollars to NAF for arbitration services.

As part of the Change in Terms, MBNA set in motion a deceptive process, consistent with NAF input, to notify cardholders of the arbitration provision. On December 20, 1999, a date specifically directed by MBNA, its mail services purportedly mailed the Change in Terms to virtually all of its existing card holders – approximately 27 million individuals. With this specific mailing date, MBNA anticipated an arrival at the cardholders' mailbox at the height of year-end holidays, and the change of the millennium with the attendant Y2K fears, when it was least likely to be noticed. In soliciting MBNA, NAF had advised how very few consumers would question the amendment to include arbitration. Moreover, the Change in Terms was intentionally packaged in a bright green envelope apparently so that it would give the appearance to cardholders of being holiday mail, rather than important business with MBNA. Additionally, in most instances, the Change in

Terms was placed in the envelope behind "courtesy checks" so that it was not apparent to the Cardholder that the Change in Terms was the most important part of the communication from MBNA. The Change in Terms Notice implied and suggested that upon rejection, all charges (including charges incurred at and for the holiday) would immediately become due and the card would be cancelled.

MBNA required rejecting cardholders to send written notice to an address not previously used. MBNA did not provide a rejection form nor even an unstamped return envelope for the unique address, though it always included a return envelope and pre-addressed form for payments. Further, the written rejection had to be received by MBNA on or before January 25, 2000. Accordingly, MBNA allowed its cardholders only a few days over the holiday season and the turn of the century to consider and reject the Change in Terms that MBNA, NAF, and their teams of lawyers had worked on for well over one year. Cardholders were specifically prohibited from contacting MBNA customer service to reject the change although MBNA often let customers communicate with it via telephone.

In December 1999, Jennifer Land was single, twenty-six years old, unemployed, and anticipating social security benefits as a result of contracting a debilitating disease. She had no formal legal training or education. During the months of December 1999 and January 2000 she lived at the address to which the Change in Terms Notice was purportedly mailed. She never received the notice. Notably, during December 1999, she was particularly careful to check her mail because she was expecting a disability award notice. In examining an exhibit of the MBNA holiday envelope, she verified she did not receive it.

MBNA and NAF never contacted Land about arbitration. There were no negotiations nor was Land given the opportunity to negotiate the terms MBNA asserted required arbitration and prohibited class actions. Land did not make any purchases or obtain cash advances on her MBNA card after June 23, 1999, including any time after the purported MBNA notice was sent. Indeed, at the time of the purported amendment, MBNA had closed her account.

MBNA asserts it was authorized under Delaware law to amend its credit card agreements at ***anytime*** and ***in any way*** by simply mailing notice. Del. Code Ann. Tit. 5 § 952(a). Land asserts Delaware law is inapplicable.

REASONS FOR GRANTING WRIT

A. Disclosure by Arbitration Service

This Court has stated that arbitration is acceptable as an alternative to litigation in court because it is simply a "different forum" – one with somewhat different and simplified rules, but nonetheless one in which the basic mechanisms for obtaining justice permit a party to "effectively vindicate" his or her rights. See, e.g., *EEOC v. Waffle House Corp.*, 534 U.S. 279, 295 n.10 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The Court has explained that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. *Gilmer*, 500 U.S. at 26.

Prior to such recent holdings, and after referencing an American Arbitration Association disclosure rule and the 33d Canon of Judicial Ethics, this Court required prospective neutral arbitrators to disclose relationships with a party stating:

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968).

In his concurring opinion, Justice White stated:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for the judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party. But if the law requires that disclosure, no such imputation can arise. And it is far better that the relationship be disclosed at the outset, when the

> parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award . . .

Id. at 151.

To achieve this goal, the Court imposed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149.

This Court, having held a neutral arbitrator must make disclosure, should also extend the disclosure requirement to the arbitration services who are known to actively solicit particular parties, have unlimited authority to select the arbitrators, and can change the applicable rules of procedure at any time.

1. Strong Presumption Favoring Arbitration

This Court has established a very strong presumption relative to the enforcement of arbitration agreements. Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Mitsubishi*, 473 U.S. at 626. In practical terms, the courts generally require arbitration of all disputes if any type of reference to arbitration is provided. With such a strong presumption, safeguards must be established to insure the arbitration service is not a collection-mill, sham, or biased in its selection of the arbitrators or application/revision of its rules of procedure.

2. Increased Number of Arbitration Clauses

The use of consumer arbitration is increasing rapidly. Many companies, banks, corporations, and retail stores choosing arbitration over trials are adding mandatory arbitration clauses in contracts with their clients. The use of consumer arbitration expanded eight years ago when Bank of America initiated its current policy. Barry Meier, *In Fine Print*, Customers Lose Ability to Sue, N.Y. TIMES, March 10, 1997, at A1. At that time, notices of the new arbitration requirements were sent along with monthly statements to twelve million (12,000,000) customers, encouraging thousands of other companies to follow the same policy. A growing number of companies require their customers to agree to use arbitration, and not the courts, to resolve disputes. First USA Bank, the largest issuer of Visa Cards, with fifty-eight million (58,000,000) customers, began requiring mandatory arbitration in 1997. In April 1999, American Express took the lead among many other credit card companies turning to arbitration clauses. Caroline E. Mayer, *You Can't Sue Us*, THE WASHINGTON POST, May 22, 1999, at A01. Edward Anderson, the managing director of the National Arbitration Forum (NAF), one of the nation's major arbitration providers and the arbitration service selected after solicitation of MBNA and American Express to resolve any disputes, was quoted acknowledging, "People who draft contracts have been including [mandatory-arbitration provisions] like popcorn." *Id.* In the case at hand, MBNA forwarded its arbitration amendment to over twenty-seven million (27,000,000) cardholders. Likewise, the National Arbitration Forum (NAF) solicitation letters to MBNA in January 1999 included an assertion that it had already been designated as the arbitration service in excess of fifty-nine million

(59,000,000) financial agreements imposed on consumers. In the employment field, many millions of employees are subject to binding arbitration provisions.

As businesses and employers continue to require submission of disputes to arbitration, safeguards need to be increased to assure arbitration is, in fact, just another forum and not a sham, collection mill, or puppet for businesses and employers.

3. Arbitral Immunity

All of the federal courts of appeals that have considered the question have found that arbitrators and their associations/administrators enjoy strict arbitral immunity. See *New England Cleaning Servs., Inc. v. AAA*, 199 F.3d 542, 545 (1st Cir. 1999) (finding that immunity protects all acts within the scope of the arbitral process, held that AAA's decision and administrative acts including selecting an arbitrator, billing or its services and scheduling a hearing were sufficiently related to the judicial process to be protected by arbitral immunity); *Honn v. National Ass'n of Securities Dealers*, 182 F.3d 1014, 1018 (8th Cir. 1999) (holding that defendant was protected by arbitral immunity even if it carried out its administrative functions improperly); *Hawkins v. National Ass'n of Securities Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998) (per curiam); *Olson v. National Ass'n of Secs. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) (stating that because the role of arbitrator is functionally equivalent to the role of judge, federal courts have uniformly extended judicial and quasi-judicial immunity to arbitrators); *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2nd Cir. 1990) (defective notice and improper selection of arbitration

panel were sufficiently associated with adjudicative phase of arbitration to justify immunity); and *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977) (concluding that "arbitral immunity should be extended to cases where the authority of an arbitrator to resolve a dispute is challenged"). As such, the arbitration services and administrators have complete unlimited control of the arbitration process including, as in this case, solicitation of the superior bargaining power party, appointment of biased arbitrators, and amendment of procedural rules to comport with wishes of the repeat and revenue-generating party.

B. Unconscionability and Relationship between NAF and MBNA

The Federal Arbitration Act (FAA) provides that arbitration clauses will ***not*** be enforced if there are grounds under a state's common law of contract for invalidating the clause. 9 U.S.C. § 2. The single purpose of the FAA is to "place arbitration agreements upon the same footing as other contracts." *Gilmer,* 500 U.S. at 24.

This Court has expressly stated that the defense of unconscionability is available to a party challenging an arbitration agreement. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]"); *Gilmer*, 500 U.S. at 33 ("courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract' ".

Unconscionability includes two aspects; (1) procedural unconscionability, referring to the circumstance surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, referring to the fairness of the arbitration provision itself. See *In re Halliburton Co.*, 805 S.W.3d 566 (Tex. 2002).

Regarding procedural unconscionability, the extant arbitration provision is invalid because of the unfair manner in which it was purportedly procured (including drafting/solicitation of NAF), as well as the disparity in bargaining power. Specifically, the MBNA and NAF teams of lawyers worked over a year drafting the provision. We have the world's largest credit card company against a young single female, unemployed and disabled. The purported notice was in a festive green holiday envelope, intentionally mailed to arrive during holidays and after significant debt had been incurred by cardholders as well as at a time when Y2K had most people concerned about possible catastrophic events. The notice was generally placed behind "courtesy checks". Likewise, the notice implied rejection of the amendment would require immediate payoff of the card, including holiday purchases. Assuming cardholders recognized the issue, they were required to reject the amendment in writing so it was received by MBNA before January 25, 2000. However, no preprinted forms or envelopes were provided and the rejection could not be done by telephone. Clearly, these facts alone prove the invalidity of the provision due to procedural unconscionability. *Gilmer* at 33.

Further, NAF's solicitation of MBNA and other financial institutions, demonstrates that it has an inherent bias against consumer claims and is evidently partial.

NAF ***refused*** to disclose its relationship with MBNA and the credit card industry even when subject to subpoena.

In soliciting MBNA, NAF touted the fact that by using it and its forms, credit companies such as MBNA could eliminate class actions and "make a positive impact on the bottom line." NAF also asserted it could save MBNA its "money and its time collecting delinquent accounts" (thereby assuming that MBNA would be correct in its position). This same document asserts that MBNA will save money by not having to incur fees in discovery. Importantly, NAF further stated it provided credit institutions like MBNA the legal basis for using arbitration ***against*** consumers, and how to put it into effect, including sample clauses for changes to the credit agreement. NAF touted the ***Offensive*** and ***Defensive*** benefits of the unilateral arbitration/no class action clause in its documents labeled ***"CONFIDENTIAL"*** provided by it to MBNA. Likewise, NAF provided MBNA its list of arbitrators in an effort to solicit MBNA's amendment to designate NAF as the arbitration service.

NAF through its own words demonstrates that arbitration here is not appropriate. It states as its first principle in its Arbitration Bill of Rights that all parties in arbitration are entitled to fundamental fairness. NAF Principle 4 required the arbitration process to be administered ***independent of all parties***. No one could ever believe that NAF, with its improper solicitation and confidential relationship with MBNA, was acting in a fundamentally fair fashion, or is neutral/independent? NAF's Vice President and General Counsel surreptitiously met with MBNA's team of lawyers and "business units" regarding drafting and implementation of the Change in Terms. MBNA and NAF refused to disclose the contents of

such meeting. NAF Principle 5 provides that "an agreement to resolve disputes through arbitration is a contract and should conform to legal principles of contract," yet it encouraged and piloted a one-sided formation by the credit institution so that it and the credit institution would benefit from the unilateral amendment. Such blatant partiality cannot conceivably provide a foundation for a fair dispute resolution. NAF expected so much business with MBNA that it even provided "electronic" downloading of claims for arbitration. Importantly, in the Trial Court, NAF refused to disclose its relationship with and the documents exchanged between it and MBNA. The Trial Court issued Letters Rogatory for the procurement of documents and information from NAF. Despite the proper procedures having been followed, including filing action in Minnesota to enforce the Trial Court's Letter Rogatory, NAF flatly refused to comply and to disclose its relationship with MBNA and the credit card industry.

The distinction between the arbitration service and the actual arbitrator is a distinction without a difference since NAF selects, trains, and retains the arbitrators as well as makes the rules and, significantly, has discretion on many issues. In fact, the NAF Director has virtually unlimited authority under the NAF Code of Procedure. Managing Director Ed Anderson has previously testified to a very curious past as counsel to consumer collection agencies prior to taking over "neutral" NAF.

By no stretch of the imagination can NAF or its arbitrators be deemed to be impartial. Petitioner requests this Court consider and determine whether the bias and solicitation of the arbitration service renders the arbitration

provision unconscionable and unenforceable under 9 U.S.C. § 2.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Writ of Mandamus Denied, Opinion and Order issued November 22, 2002

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-02-01693-CV

IN RE JENNIFER LAND, Relator

Original Proceeding from the
116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 01-5890

MEMORANDUM OPINION AND ORDER
Before Justices James, Wright, and Lang
Opinion By Justice Lang

Relator contends the trial judge erred in compelling arbitration under the federal arbitration act, denying a continuance of the motion to compel hearing, and overruling objections to an affidavit submitted by real party in interest. The facts of this original proceeding are known to the parties so we do not recite them here. We conclude relator has not shown the trial judge clearly abused his discretion in compelling arbitration under the federal arbitration act, denying the continuance of the motion to compel hearing, and overruling relator's objections to real party in interest's affidavit. Accordingly, relator's petition for writ of mandamus is **DENIED**. *See* TEX. R. APP. P.

52.8(a); *Walker v. Packer*, 827 S.W.2d 833, 839-42 Tex. 1992) (orig. proceeding); *GTE Communications Sys. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding).

/s/ Douglas S. Lang
DOUGLAS S. LANG
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

Order issued December 20, 2002.

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-02-01693-CV

IN RE JENNIFER LAND, Appellant
V.
THE STATE OF TEXAS, Apellee

ORDER

The relator's December 9, 2002 motion for rehearing is hereby **DENIED**.

/s/ Douglas S. Lang
DOUGLAS S. LANG
JUSTICE

CAUSE NO. 01-5890

JENNIFER R. LAND, Individually and on Behalf of ALL OTHER of Similarly Situated Persons,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	**OF DALLAS COUNTY**
v.	§	
METRO COLLECTIONS n/k/a VIKING COLLECTION SERVICES SOUTHWEST, INC., VIKING COLLECTION SERVICES, INC., and MBNA AMERICA BANK, N.A.,	§	
Defendants.	§	**116TH JUDICIAL DISTRICT**

ORDERS RELATED TO MOTION TO COMPEL ARBITRATION

On August 9, 2002, the Court heard Defendant MBNA America Bank, N.A.'s' ("MBNA") Verified Plea in Abatement and Motion to Compel Arbitration ("MBNA's Motion") and Plaintiff's Motion for Continuance, Objections, and Response to [MBNA's Motion]. After hearing the arguments of counsel, reviewing and considering the appropriate papers on file, and considering the applicable law, the Court rules as follows: It is

ORDERED that Plaintiff's Motion for Continuance is denied. It is further

ORDERED that Plaintiff's Objections to the Deborah Fisher Affidavit and the Deborah Fisher Supplemental Affidavit are overruled. It is further

ORDERED that MBNA's Motion is granted.

SIGNED this 4th day of ~~August~~ September, 2002.

/s/ Carlos Lopez
Judge Presiding

[SEAL]

THE SUPREME COURT OF TEXAS
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April 03, 2003

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RE: Case Number 03-0091
Court of Appeals Number: 05-02-01693-CV
Trial Court Number: 01-5890

Style: IN RE JENNIFER LAND

Dear Counsel:

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case.

Sincerely,

Andrew Weber, Clerk

by /s/ Jessica L. Vlasac
Jessica L. Vlasac, Deputy

cc: Ms. Lisa Matz, Clerk
Mr. Jim Hamlin
The Honorable Carlos Lopez